LIM YOK ENG

v.

CHAN CHIN MIN & ANOR.

HIGH COURT MALAYA, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 23(25)-27-1992
3 JUNE 1993

TORT: Running down action - Dependency claim - Assessment of damages - Measure of damages - Loss of support - Civil Law Act 1956, s. 7(3) - Whether the Court could consider extraneous factors in applying the statutory formula.

In this running down action, the defendants admitted that the plaintiff's son was killed as a result of the sole negligence of the defendants. At the hearing the plaintiff gave evidence that the deceased gave her at least RM700 and at most RM800 per month. The plaintiff further testified that out of this money, she spent approximately half on her minor children and the other half on herself.

The defendants argued that pursuant to s. 7(2) of the Civil Law Act 1956 (the Act) the action was for the benefit of the mother of the deceased. As the plaintiff had given evidence that she only spent about half of the money on herself, the only loss of support she had suffered was the amount she spent on herself. In the premises the defendants contended that the multiplicand should be between RM250 to RM300.

Held:

[1] The old s. 7(3) of the Act provided for damages for loss resulting from the death whereas the amended s. 7(3) provides for damages for any loss of support suffered. The word "support" should not be restricted to food or sustenance for the plaintiff but should equate with the pecuniary benefit the plaintiff received from her son so as to enable her to lead a certain life style.

[2] In the circumstances, the measure of damages is the pecuniary loss suffered by the plaintiff as a result of the death of her son. The pecuniary loss is the actual benefit of which the plaintiff has in fact been deprived. Accordingly the plaintiff has suffered loss of support to the extent of the money the son gave her, namely an average of RM750 per month.

[3] There was no evidence of the possibility let alone probability of investment being available to the plaintiff and the defendants argument, that the damages awarded if capitalised and invested would produce a return in excess of that which the plaintiff testified to receiving from the deceased, had to be disregarded.

[4] The damages are to be assessed according to the statutory formula contained within the 4 corners of the legislation and extraneous factors such as accelerated payment, prospects of marriage of the deceased, likelihood of cessation of dependancy and so on, which factors should be taken as having been built into the statutory formula, are to be disregarded.

[Judgment for the plaintiff with interest and costs].

[Ed. Note: The defendants appealed to the Supreme Court. The Supreme Court's decision is reported at [1994] 3 CLJ 687]

Case referred to:

Yap Ami & Anor v. Tan Hui Pang [1982] 2 MLJ 316 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 7(2)(3)
Guardianship of Infants Act 1961, ss. 3, 6

For the plaintiff - J. F. Pereira; M/s. M. S. Miranda & Co.
For the defendants - K. S. Dass; M/s. K. Sila Dass & Partners

JUDGMENT

Richard Talalla J:

This is a running down action in which the defendants admitted that the plaintiff's son was killed as a result of the sole negligence of the defendants.

There was only one issue of fact and that is how much the deceased was giving his mother, the plaintiff, for her support before his untimely death.

Senior Counsel for the defendant conceded the plaintiff's claim that the deceased's earnings per month were RM1500 and that the statutory multiplier was 16 years. The parties agreed that the plaintiff's familial position was that she was born on 25 January 1943, married at 23 years of age and, apart from the deceased, had eight living children, the elder five being female born between 1964 and 1972, all being married except the last who was working as a shop assistant, that the three youngest were schoolboys,

born between 1974 and 1977, that her husband was a rubber tapper who passed away in 1986 aged 51 years of age, that he was tapping for others and was as well an odd job labourer and that her deceased son was born on 2 April 1966 and killed on 5 November 1991.

The trial commenced before me on 8 March 1993 when the plaintiff testified that she was then working as a rubber tapper, that at the time of her son's death he was the one who took care of the family, that at that time she was not working and that the deceased gave her every month at least RM700 and at most RM800 per month.

In cross-examination the plaintiff said that the deceased did all kinds of jobs including catching fish, that he started working at the age of 18 or 19 years because he had no father, that at that time she the plaintiff was also working - as a rubber tapper, that she stopped tapping rubber at the request of the deceased some five years before his death whereafter she did not work at all.

The plaintiff went on to testify that at the time of her son's death only 3 children were schooling and that the rest of them working, that whatever the other children earned was just enough for themselves and that they did not give her any money, that the deceased gave her the money because there were three other children also to support, that of this money she spent approximately half on the children and the other half on herself, that the money was for the household expenses.

That was the case for the plaintiff. The defence led no evidence. Both Counsel agreed that the deceased was in good health for the purposes of proviso (a) to s. 7 (3)(iv) of the Civil Law Act 1956 (the Act) and that only the multiplicand was in issue and in this regard that the 3 youngest children only were under the mother's support at the time her son was killed. Counsel for the plaintiff submitted that the multiplicand should be RM750 per month whereas Counsel for the defendants suggested a multiplicand of RM250 to RM300 arguing that what the plaintiff had suffered was the loss of the support given by the deceased, that pursuant to s. 7(2) of the Act the action was for the benefit of the mother of the deceased, that on her evidence of the money she received from the deceased she spent about half on herself and half on her 3 children and accordingly the only loss she had suffered was the amount she spent on herself.

The matter was then adjourned to 11 March 1993 for further consideration. When on that day the trial resumed Counsel for the defendants applied for leave of the Court to recall the plaintiff to cross-examine her and put to her through the Court questions relating to the deceased's prospects of marriage, whether he was owning a motorcycle and if so whether it was on hire purchase and also to put to her that she did not receive RM700 or RM800 per month as alleged by her. Upon objection the application was refused. The case was effectively at an end on 8 August. All that remained was some perplexity in regard to the scope of the expression "loss of support". It was not fair for the defendants, having had the advantage of learned argument on both sides, then to rearrange their cross-examination with the aim of filling the gaps, so to speak.

Reverting to the main issue, it is significant that s. 7(3) was amended with effect from 1 October 1984. The amendment introduced a new expression "loss of support" and it is significant that expression is preceded by the word "any". The old s. 7(3) provided for damages for loss resulting from the death whereas the new s. 7(3) provides for damages for any loss of support suffered. As I see it the word "support" should not be restricted to food or sustenance for the plaintiff but should equate with the pecuniary benefit the plaintiff received from her son so as to enable her to lead a certain life style. He was obviously a dutiful and loving son. He relieved his mother of the necessity of going out to work as a rubber tapper or engage in similar arduous labour. He specifically stopped her from working. Instead he provided her with funds not only to maintain herself but also to enable her to carry out the duty that had befallen her on the demise of her husband namely being responsible for the support, health and education of the minor children. See ss. 3 and 6 of the Guardianship of Infants Act 1961. With the son's death the plaintiff's life style has been taken away from her. She has had to go out and work. Accordingly in my view she has suffered loss of support to the extent of the money the son gave her namely an average of RM750 per month. What she chose to do with the money her son gave her should not be the concern of the defendant tortfeasors. The measure of damages is the pecuniary loss suffered by the plaintiff as a result of the death of her son. The pecuniary loss is the actual benefit of which the plaintiff has in

fact been deprived. So said the Federal Court in the case of *Yap Ami & Anor. v. Tan Hui Pang* [1982] 2 MLJ 316 at page 320.

Counsel for the defendants then argued that if RM700 per month for 16 years was awarded, that capitalised would amount to RM134,400 which if invested at a rate of 8% would produce a return of RM10,752 per annum which is more than the RM700 the plaintiff testified to receiving from the deceased. There was no evidence before me of the possibility let alone probability of investment at that rate of interest being available to the plaintiff and accordingly I disregarded the argument. Counsel for the defendants also submitted that there was the advantage of accelerated payment and that apart from accelerated payment the Court should take into consideration the likelihood of the cessation of payment by reason of the death of the plaintiff, the cessation or reduction of payment by the deceased probably having married and having his own family, the deceased himself dying early had he lived, the plaintiff's infant children dying early or growing up and becoming self supporting. The view I took was that all these matters have been taken care of in the amended legislation in the form of the multiplier being statutorily fixed and the statutory exclusion namely the prospect of earnings being increased at any period after the person's death.

In this case the damages were assessed according to the statutory formula contained within the 4 corners of the legislation and extraneous factors such as accelerated payment, prospects of marriage of the deceased, likelihood of cessation of dependency and so on, all which factors were taken as having been built into the statutory formula, were disregarded and accordingly I found that the loss of support suffered by the plaintiff to be RM750 per month and gave the plaintiff judgment accordingly with interest and costs.

LORI MALAYSIA BHD. & 4 ORS.

v.

LESLIE CHEDZOY & 3 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[SUIT NO. D4-22-1534-1991]
21 JUNE 1994

PRACTICE & PROCEDURE: Application by 1st defendant to set aside ex parte order for Anton Pillar, injunction and appointment of interim receivers - Allegation of material non-disclosure and misrepresentation - Whether further evidence can be introduced during inter partes proceedings to rectify deficiency during ex parte proceedings - Whether plaintiffs' affidavit was misleading - Whether ex parte order should be set aside - Consideration of balance of convenience and potential damage to plaintiffs.

This was an application by the 1st defendant to set aside an *ex parte* order of Court granting the plaintiffs an Anton Pillar order, an injunction and appointing interim receivers to manage the affairs of the 1st plaintiff.

The 3rd, 4th and 5th plaintiffs were the directors and majority shareholders of Technivest Sdn. Bhd., the 2nd plaintiff, which company had majority control of Lori Malaysia Bhd, the 1st plaintiff. The 1st plaintiff obtained loans from various financial institutions totalling RM30 million which loans were secured by *inter alia* the personal guarantees of the directors. The financial institutions demanded payment of the outstanding loan sum and sought to enforce the personal guarantees. In August 1991, in consideration of RM1 and an undertaking by the 1st defendant to restructure the 1st plaintiff and obtain the release of the 3rd, 4th and 5th plaintiffs from the guarantees the said plaintiffs entered into a sale and purchase agreement with the 1st defendant and handed over full control of the 1st and 2nd plaintiffs to him afterwhich they resigned as directors. Upon the 1st defendant's failure to comply with his obligations under the agreement the plaintiffs filed a suit against the defendants, the new directors.

On 19 November 1991 the plaintiffs applied *ex parte* and obtained an Anton Pillar order to enter the premises of the 1st and 2nd defendants and plaintiffs to search and remove all documents relating to the case, an injunction restraining the defendants from acting as or holding themselves out as directors of the 1st